WAN KHAIRANI WAN MAHMOOD

v.

ISMAIL MOHAMAD & ANOR

COURT OF APPEAL, PUTRAJAYA
ZULKEFLI MAKINUDIN JCA
RAUS SHARIFF JCA
HELILIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: W-02-853-2002]
7 SEPTEMBER 2007

CIVIL PROCEDURE: *Injunction - Jurisdiction to grant, scope of - Syariah and civil courts - Abuse of process - Equity - Damages - Balance of convenience - Federal Constitution, art. 121(1A)*

CIVIL PROCEDURE: *Jurisdiction - Court - Syariah and civil courts - Injunction - Abuse of process - Equity - Damages - Balance of convenience - Federal Constitution, art. 121(1A)*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Syariah and civil courts - Injunction - Abuse of process - Equity - Damages - Balance of convenience - Federal Constitution, art. 121(1A)*

ISLAMIC LAW: *Jurisdiction - Syariah and civil courts - Injunction - Abuse of process - Equity - Damages - Balance of convenience - Federal Constitution, art. 121(1A)*

The first respondent and one Mohamed Mustapha ('Mohamed') were at all material times directors in a company called Sri Alam Sdn Bhd ('Sri Alam'). At the material time, the appellant and the first respondent were directors and shareholders of the second respondent, a company called Rasa Rata Sdn Bhd ('Rasa Rata'). Apparently, on 30 December 1994, Sri Alam obtained an order dated 5 January 1995 ('1995 Order') whereby the first respondent was declared a trustee of two pieces of land ('subject lands') for Sri Alam. The appellant alleged that the first respondent and Mohamed "deliberately deceived" and misled the court in granting the 1995 Order as they knew that the subject lands were to be acquired by the relevant state authority. She further submitted that the deception was also engineered when the first respondent knew that the purchase price for the subject lands were in fact paid by Rasa Rata by virtue of a trust deed executed on 21

January 1986 by the first respondent and Rasa Rata, in the presence of Mohamed. The subject lands were then stated to have been compulsorily acquired by the state authority, with the first respondent being the recipient of two cheques totalling RM119,536,026 as compensation for the acquisition ('compensation monies'). The appellant contended that the first respondent was retaining the compensation monies in his personal account without transferring the same to the accounts of Sri Alam or Rasa Rata. She filed an action seeking a declaration that the first respondent was a trustee for all the compensation monies received and yet to be received, and an order that the sum be paid to the second respondent forthwith.

Pursuant to that action, the appellant then filed an application for an injunction and obtained an *ex parte* order for an injunction restraining the first respondent from utilizing the compensation monies for any purpose other than for the benefit of the second respondent. Subsequently, however, upon the *inter partes* hearing of the application for the confirmation of the injunction, that application was dismissed. The present appeal by the appellant was against that decision of the High Court. In opposing the appeal, the respondents raised the following three issues: (i) the appellant had already lodged a claim in the Syariah court where the subject lands also constituted part of her claim, and by her instituting a civil claim, there was an abuse of process due to duplicity of proceedings; (ii) by virtue of the provisions of art. 121(1A) of the Federal Constitution ('FC'), it was submitted that the Court of Appeal was lacking in jurisdiction since the appellant had claimed the subject lands as "harta sepencarian" in the Syariah Court, which claim was still pending before the said court; and (iii) the appellant should be denied the equitable injunctive relief on account of alleged misleading averments made throughout the proceeding, that is, she had not come with clean hands. It was argued that the appellant had failed to disclose to the High Court that an action had been commenced by her in the Syariah court for a half share of the subject lands as "harta sepencarian", which was in contradiction of her averment in the application for injunction that the subject lands belonged instead to the second respondent. In the Syariah action, the appellant had given sworn evidence that the subject lands were registered in the name of the first respondent and, hence, the averments she made in her affidavit were alleged to be misleading.

Held (allowing the appeal)
Per Heliliah Mohd Yusof JCA delivering the judgment of the court:

(1) In this appeal, the court was concerned with the question of interpretation on the question of jurisdiction. It was also apt here to harmonise the interpretation to be given to the jurisdiction of the Syariah and civil courts. The ascertainment of the precise status of the subject lands before they changed form into a monetary compensation was the issue before the civil court. The determination of the question relating to the transactions alleged to be undertaken by two companies, namely, Sri Alam and Rasa Rata, was capable of assisting rather than negating the jurisdiction of the Syariah court for purposes of apportioning the "harta sepencarian". The efficacy of the jurisdiction of the Syariah court would not be impaired or prejudiced by a civil court determining whether there were indeed transactions undertaken by a company in respect of which both the appellants and respondents were directors. In any event, this was not strictly a matter concerning the practise of faith in Islam but one of matters relating to the activities of companies where the persons involved were professing the religion of Islam. The core of the appellant's claim remained within the sphere of secular law. The first two objections to jurisdiction were, therefore, not upheld. This court was able to exercise its jurisdiction without violating the object of art. 121(1A) of the FC. (para 45)

(2) The appellant, in one of the affidavits in support of the application for injunction, had affirmed that it was only in recent times that she had discovered a trust deed indicating for the first time that the purchase price for the subject lands had in fact been paid by the second respondent and that, thus, it was beneficially entitled to the subject lands. In addition, the appellant contended that the trust deed that was averred to be executed on 21 January 1986 by the first respondent declared, *inter alia*, that he held the subject lands in trust for the second respondent as beneficiary. What the appellant alleged here was that there was also the wilful suppression of the existence of the trust deed by the first

respondent. In the present appeal, the explanation provided by the appellant was found to be plausible in considering whether her actions were intended to be deliberately misleading or otherwise. (paras 47 & 48)

(2a) Having dealt with that point, it was still necessary to consider whether damages should be the more adequate remedy and whether the balance of convenience lay in favour of granting the injunction (*American Cyanamid Co v. Ethicon Ltd* (foll)). The appellant was seeking to maintain a *status quo*, that is, the compensation monies in the first respondent's account hazarded a risk of being transferred or dissipated. It was also contended that this was not strictly a question of seeking damages but a restitution of assets that were alleged to be rightly standing to the credit of the second respondent instead. On this ground, it was submitted that the question of whether damages would be a more adequate remedy was irrelevant. This point had not been seriously contested. The risk of doing an injustice in the circumstances of the case would operate against the appellant as the compensation from the acquisition of the subject lands had already been transferred to the first respondent, and it was further contended that more compensation would be expected. However, it also had to be considered whether the injunction if granted should be so granted in terms which were as wide as prayed for. While both the appellant and the first respondent were directors of Rasa Rata, the appellant was the minority shareholder of the second respondent, in which she was the registered and beneficial owner of 512,000 ordinary shares of RM1 per share, equivalent to 7.97% in the capital of the second respondent. Hence, if the first respondent were to be ordered to be injuncted from utilizing or transferring or withdrawing the sums received by him, the concern here was that it would be too wide in its terms as – the first respondent as a director and majority shareholder of the second respondent and being the registered and beneficial owner of 5,909,039 ordinary shares of RM1 per share – it was equivalent to 92.03% in the capital of the second respondent. In the final analysis, the order of the learned High Court judge refusing the application for injunction should be set aside. (paras 48, 49, 50, 51, 52 & 53)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama dan seorang Mohamed Mustapha ('Mohamed') adalah pada setiap masa material pengarah-pengarah dalam syarikat yang dipanggil Sri Alam Sdn Bhd ('Sri Alam'). Pada masa yang sama, perayu dan responden pertama adalah pengarah-pengarah dan pemegang saham dalam responden kedua, sebuah syarikat yang dipanggil Rasa Rata Sdn Bhd ('Rasa Rata'). Pada 30 Disember 1994, Sri Alam kelihatannya memperoleh satu perintah bertarikh 5 Januari 1995 ('Perintah 1995'), mengisytiharkan responden pertama sebagai pemegang amanah dua keping tanah ('tanah-tanah tersebut') bagi pihak Sri Alam. Perayu mendakwa bahawa responden pertama dan Mohamed telah "dengan sengaja memperdaya" dan menipu mahkamah untuk mengeluarkan Perintah 1995, kerana mereka mengetahui bahawa tanah-tanah tersebut akan diambil oleh pihakberkuasa negeri yang relevan. Dihujahkan seterusnya bahawa penipuan adalah dirancang kerana responden pertama tahu bahawa harga pembelian tanah-tanah tersebut sebenarnya telah dibayar oleh Rasa Rata ekoran satu suratikatan amanah yang dimeterai di antara responden pertama dan Rasa Rata pada 21 Januari 1986, dengan kehadiran Mohamed. Tanah-tanah tersebut kemudian dikatakan sebagai telah diambilpaksa oleh pihakberkuasa negeri, dengan responden pertama menjadi penerima dua cek bernilai RM119,536,026 sebagai pampasan ('wang pampasan'). Perayu berhujah bahawa responden pertama telah menyimpan wang pampasan di dalam akaun peribadinya tanpa memindahkannya kepada akaun-akaun Sri Alam atau Rasa Rata. Beliau dengan itu telah memfail tindakan bagi mendapatkan deklarasi responden pertama adalah pemegang amanah bagi semua wang pampasan yang diterima dan yang akan diterima, serta perintah supaya jumlah tersebut dibayar kepada responden kedua dengan serta merta.

Berikutnya juga, perayu memfail permohonan injunksi dan mendapat perintah injunksi *ex parte* menghalang responden pertama dari menggunakan wang pampasan untuk sebarang maksud selain dari untuk menfaat responden kedua. Apapun, ekoran pendengaran *inter partes* permohonan untuk mengesahkan injunksi, permohonan injunksi tersebut telah ditolak. Rayuan semasa perayu adalah terhadap keputusan Mahkamah Tinggi tersebut. Responden-responden membantah rayuan dan membangkitkan tiga isu berikut: (i) perayu sudahpun memasukkan tuntutan di Mahkamah Syariah di mana tanah berkenaan juga menjadi sebahagian dari

tuntutannya, dan oleh itu pemfailan tuntutan sivil oleh perayu adalah satu salah guna proses kerana wujud kependuaan prosiding; (ii) berdasarkan peruntukan per. 121(1A) Perlembagaan Persekutuan ('FC'), ianya dihujahkan bahawa Mahkamah Rayuan tidak mempunyai bidangkuasa oleh kerana perayu telah menuntut tanah-tanah tersebut sebagai "harta sepencarian" di Mahkamah Syariah, tuntutan mana masih menunggu keputusan mahkamah tersebut; dan (iii) perayu tidak harus diberi relif injunktif berekuiti kerana telah mengeluarkan kenyataan-kenyataan mengelirukan di sepanjang prosiding berjalan, kerana ia menunjukkan perayu tidak datang dengan tangan yang bersih. Dihujahkan lagi bahawa perayu gagal mendedahkan ke Mahkamah Tinggi bahawa suatu tindakan telah dimulakan olehnya di Mahkamah Syariah untuk separuh bahagian tanah-tanah tersebut sebagai "harta sepencarian", yang mana ianya adalah bertentangan dengan pengataannya di dalam permohonan untuk injunksi bahawa tanah-tanah tersebut dimiliki oleh responden kedua. Di dalam tindakan Syariah, perayu telah memberi keterangan bersumpah bahawa tanah berkenaan telah didaftar atas nama responden pertama, dan kerana itu pengataan yang beliau buat di dalam afidavitnya adalah mengelirukan.

Diputuskan (membenarkan rayuan)
Oleh Heliliah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) Dalam rayuan ini, perhatian mahkamah hanya tertumpu kepada soal pentafsiran iaitu mengenai persoalan bidangkuasa. Sehubungan itu, adalah juga sesuai untuk mengharmonikan pentafsiran yang akan diberi kepada bidangkuasa Mahkamah Syariah dan mahkamah sivil. Penentuan status tanah-tanah tersebut sebelum ia bertukar bentuk kepada wang pampasan adalah isu di hadapan mahkamah sivil. Penentuan persoalan mengenai transaksi-transaksi yang dikata telah dilaksanakan oleh dua buah syarikat, iaitu Sri Alam dan Rasa Rata, boleh membantu dan bukannya menyangkal bidangkuasa Mahkamah Syariah Syariah bagi maksud membahagikan "harta sepencarian". Keutuhan bidangkuasa Mahkamah Syariah tidak terjejas atau diprejudis oleh mahkamah sivil yang menentukan sama ada terdapat atau tidak transaksi yang dilaksanakan oleh sebuah syarikat di mana kedua-dua perayu dan responden adalah pengarah-pengarahnya. Walau apapun, ini bukanlah satu persoalan mengenai amalan ugama Islam tetapi adalah perkara berhubung dengan kegiatan-kegiatan di mana orang-

orang yang terlibat adalah beragama Islam. Intisari tuntutan perayu masih berada dalam bidang undang-undang sekular. Dua bantahan pertama terhadap bidangkuasa, dengan itu, tidak boleh dibenarkan. Mahkamah ini boleh melaksanakan bidangkuasanya tanpa menyanggahi objek per. 121(1A) FC.

(2) Perayu, dalam salah satu afidavit bagi menyokong permohonan injunksi, telah mengesahkan bahawa hanyalah dalam waktu-waktu terakhir ini bahawa beliau mendapat tahu tentang suratikatan amanah yang menyerlahkan buat pertama kalinya bahawa harga belian tanah-tanah tersebut sememangnya telah dibayar kepada responden kedua, yang dengan itu berhak kepada tanah-tanah tersebut. Selain itu, perayu mengatakan bahawa suratikatan amanah yang dikatakan dimeterai pada 21 Januari 1986 oleh responden pertama, antara lain mengisytiharkan bahawa beliau memegang tanah-tanah tersebut untuk amanah responden kedua selaku benefisiari. Apa yang didakwa perayu di sini adalah bahawa terdapat juga penyorokan secara sengaja akan kewujudan suratikatan amanah oleh responden pertama. Dalam rayuan semasa, dalam menimbang sama ada perayu dalam tindakan-tindakannya berniat untuk mengelirukan, penjelasan yang diberikan oleh perayu adalah menyakinkan.

(2a) Setelah menangani persoalan di atas, adalah perlu untuk menimbang seterusnya sama ada gantirugi merupakan remedi yang mencukupi dan sama ada imbangan keselesaan berada di pihak membenarkan injunksi (*American Cyanamid Co v. Ethicon Ltd* (diikuti)). Perayu berhasrat untuk mengekalkan *status quo*, yakni, wang pampasan yang berada di akaun responden pertama menghadapi risiko akan dipindahkan atau dipupus. Juga dihujahkan bahawa ini tegasnya bukanlah tindakan untuk mendapat gantirugi, tetapi adalah bagi pengembalian aset yang didakwa berada di dalam akaun responden kedua. Atas alasan ini, dihujahkan bahawa persoalan sama ada gantirugi merupakan remedi yang lebih mencukupi adalah tidak relevan. Point ini tidak dicabar dengan secara serius. Risiko melakukan ketidakadilan dalam halkeadaan yang wujud beroperasi secara yang menentang perayu, kerana pampasan dari pengambilan tanah-tanah tersebut telahpun dipindahkan kepada responden pertama, selain dari hujah bahawa lebih banyak pampasan dijangkakan akan dibayar. Bagaimanapun, harus juga dipertimbangkan sama ada injunksi, jika dibenarkan, harus dibenarkan atas

terma-terma seluas yang dipohonkan. Sementara kedua-dua perayu dan responden pertama adalah pengarah-pengarah Rasa Rata, perayu adalah pemegang saham minoriti dalam responden kedua, di mana beliau adalah pemilik berdaftar dan benefisial kepada 512,000 saham biasa bernilai RM1 sesaham, iaitu bersamaan dengan 7.97% modal responden kedua. Oleh itu, jika responden pertama diperintah supaya diinjunksikan dari mengguna atau memindah atau mengeluarkan wang-wang yang diterima olehnya, masaalah yang timbul adalah, ianya terlalu luas dalam terma-termanya disebabkan responden pertama – selaku pengarah dan pemegang saham majoriti responden kedua dan yang merupakan pemilik berdaftar dan benefisial 5,909,039 saham biasa bernilai RM1 sesaham – memegang 92.03% pegangan modal responden kedua. Pada analisa terakhir, perintah yang arif hakim Mahkamah Tinggi menolak permohonan injunksi harus diketepikan.

[Perintah sekadarnya.]

Case(s) referred to:

American Cyanamid Company v. Ethicon Limited [1975] AC 396 ***(foll)***

Azizah Shaik Ismail & Anor v. Fatimah Shaik Ismail & Anor [2003] 4 CLJ 281 FC ***(refd)***

Cayne v. Global Natural Resources plc [1984] 1 All ER 225 ***(refd)***

Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC ***(refd)***

Harshad S Mehta and Others v. State of Maharashtra [2001] 8 SCC 257 ***(refd)***

Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557 FC ***(refd)***

Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors [2003] 3 CLJ 289 FC ***(refd)***

Mohd Habibullah Mahmood v. Faridah Dato Talib [1993] 1 CLJ 264 SC ***(refd)***

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 FC ***(refd)***

Legislation referred to:

Administration of Islamic Law (Federal Territories) Act 1993, s. 46(2)
Courts of Judicature Act 1964, s. 25(2)
Federal Constitution, art. 121(1A)
Islamic Family Law (Federal Territories) Act 1984, ss. 2, 58
Syariah Court Civil Procedure (Federal Territories) Act 1998, ss. 199(1), 200

Other source(s) referred to:
NS Bindra's, *Interpretation of Statutes*, 9th edn, p 356

For the appellant - Sulaiman Abdullah (PY Chong with him); M/s Nordin Torji & Partners
For the respondents - Dato' Dr Cyrus Das (Abdul Rashid Ismail, Megat Abdul Munir & Abdul Muiz Samuri with him); M/s Khalek Awang & Assoc

[Appeal from High Court, Kuala Lumpur; Writ of Summons No: S4-22-1143-2002]

Reported by Suresh Nathan

JUDGMENT

Heliliah Mohd Yusof JCA:

[1] This was an appeal against the decision of the learned High Court Judge in dismissing an application by the appellant/plaintiff at the *inter parties* stage, for an injunction. The appeal has been allowed and the reasons are stated herein

The Background

[2] Before embarking on the reasons it is necessary to outline the facts leading to the appeal as there was an objection raised by the respondent/defendant that the appellant/plaintiff was also maintaining in the Syariah Court of the Federal Territory of Kuala Lumpur an action for harta sepencarian orders (the Syariah action) in respect of certain land identified in grant 27446 Lot No. 3777 also citing the first respondent in this appeal as the defendant.

[3] The Syariah action for harta sepencarian orders commenced on 15 October 1992 following the divorce of the appellant and respondent on 2 May 1990. It was disclosed that on 16 October 2001 the appellant had also added on to the harta sepencarian claim another piece of land identified under grant 31445 Lot No 5539. Both these lands that is land held under grant 27446 Lot 3777 and grant 31445 Lot 5539 may be referred to as the "subject lands".

[4] On 30 September 2002 while the Syariah action was still pending, the appellant filed a civil suit seeking a declaration. It is relevant to describe the background for the appellant's civil suit in order to deal with the issues in the appeal.

[5] The first respondent and one Mohamed bin Mustapha were at all material times directors in a company called Sri Alam Sdn. Bhd. (to be referred to as the "Sri Alam company"). At the material time the appellant and first respondent are directors and shareholder of a company called Rasa Rata Sdn. Bhd. (to be referred to as the "Rasa Rata company"). Apparently on 30 December 1994 the Sri Alam company obtained an order dated 5 January 1995 (or the 1995 Order) whereby the first respondent was declared as trustee of the abovementioned subject lands for the Sri Alam company. It has been the allegation of the appellant that the first respondent and the said Mohamed "deliberately deceived " and misled the court in granting the 1995 Order as follows that is:

(a) Sri Alam company had by an agreement in writing dated 4 September 1975 purchased the subject lands;

(b) by a deed of assignment dated 9 September 1977, Sri Alam company assigned all its rights in and under the aforesaid agreement to the first respondent;

(c) the first respondent completed the purchase of the said lands and caused the said lands to be registered in his name as proprietor.

[6] The appellant has averred that the above mentioned deception was advanced on the basis of the knowledge of the first respondent and Mohamed bin Mustapha that the subject lands were to be acquired by the relevant state authority.

[7] It was further averred that the deception was also engineered when it was alleged to be known by the first respondent that the purchase price for the said lands were in fact paid by the Rasa Rata company by virtue of a trust deed executed on 21 January 1986 by the first respondent and Rasa Rata company in the presence of the aforementioned Mohamed bin Mustapha.

[8] The subject lands were then stated to have been compulsorily acquired by the state authority resulting in cheques No. 035276 dated 10 October 1997 for the amount RM4,236,341 and No. 098289 dated 8.1.1999 for RM115,299,685 totalling RM119,536,026 both being drawn on Bank Bumiputra Malaysia

with the first respondent being the recipient as compensation for the acquisition which was alleged to be maintained at AM Finance Bhd.

[9] It is the contention of the appellant that the first respondent is retaining the compensation in his personal account without transferring the same to the account of the Sri Alam or Rasa Rata company.

[10] On 30 September 2002 the appellant filed an action S22-1143-2002 against the first and second defendants (now the first and second respondents respectively).

The Main Action Filed

[11] The appellant in a statement of claim which was amended on 3 October 2002 claimed:

(a) a declaratory order that the first defendant (first respondent) is a trustee for all the compensation monies received and yet to be received for the acquisition of lands held under Grant 27446 Lot No. 3777 and Grant 31445 Lot No. 5539 (namely the subject lands).

(b) an order that the sum of RM119,536,026 be paid to the second defendant (second respondent) forthwith. In the statement of claim the appellant had stated that she had brought the action for and on behalf of the second respondent by way of a derivative action for the benefit of the second defendant/respondent, being at all material times a director and minority shareholder of the second defendant and being the registered and beneficial owner of 512,000 ordinary shares of RM1 per share equivalent to 7.97% in the capital of the second defendant/respondent. The statement of claim also identified the first defendant/respondent as a director and majority shareholder of the second defendant being the registered and beneficial owner of 5,909,039 ordinary shares of RM1 per share equivalent to 92.03% in the capital of the second defendant/respondent.

Enclosure 4 (Application For Injunction)

[12] Pursuant to the aforementioned main action the appellant then filed an application for an injunction (encl. 4) and obtained an *ex parte* order for an injunction dated 23 October 2002 in the following terms, *inter alia*;

The first respondent be restrained from utilizing or transferring or withdrawing the sums received by the first respondent *vide* cheques no. 035276 dated 10 October 1997 for RM4,236,341 and no. 098289 dated 8 January 1999 for RM115,299,685 totalling RM119,536,026 both drawn on Bank Bumiputra Malaysia Bhd. as compensation for the compulsory acquisition of the lands held under Grant 27446 Lot 3777 and Grant 31445 Lot 5539 or any part thereof deposited by the first respondent with AM Finance or any financial institution inclusive of accrued interest thereon and be further restrained from using any payments of compensation from the relevant authorities in respect of the aforesaid lands for any other purposes than for the benefit of the second respondent. There are several other terms of the order which it is found unnecessary to mention for the purposes of this appeal.

[13] Subsequently however upon the hearing *inter parties* of the application for the confirmation of the injunction that application was dismissed by an order dated 18 November 2002. The present appeal arose from that order that is 18 November 2002 order.

The Appeal

[14] Three issues have been raised by learned counsel for the respondents in opposing the appeal as follows:

(1) the appellant has already lodged a claim in the Syariah court where the subject lands also constitute part of her claim and by instituting the civil claim there is therefore an abuse of process by duplicity of proceedings;

(2) by virtue of the provisions of art. 121(1A) of the Federal Constitution (FC) it was averred that the Court of Appeal was lacking in jurisdiction since the appellant has claimed the subject lands as harta sepencarian in the Syariah court and the claim is still pending before the said court;

(3) the appellant should be denied the equitable injunctive relief on account of alleged misleading averments made throughout the proceeding that is she has not come with clean hands.

[15] The first two issues are interwoven. The issue on the application of the art. 121(1) FC has arisen once again in this case in the context of the scope of jurisdiction of the Syariah court and civil court. At the time of writing the grounds of the judgment

in this appeal the Federal Court on 1 June 2007 had delivered a judgment in *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Ors.* [2007] 3 CLJ 557. This case has to be referred to specifically for the reason that it has further affirmed the judicial approach to be applied when the question of the scope of jurisdiction of the Syariah court and the civil court becomes an issue. This most recent decision has not only considered but also reviewed several past decisions on the question of the scope of jurisdiction of the Syariah court. This court is also mindful to observe that the decisions considered in the *Lina Joy* case, *supra*, pertain to the issue of the practise and propagation of the religion of Islam. I would also give attention to the fact that the majority judgment in the Federal Court in the *Lina Joy*'s case had also given affirmation to the case of *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5. *Soon Singh*'s case had indicated that even when no express provisions conferred jurisdiction on the matter of apostasy in a Kedah Enactment nevertheless the Syariah court would be vested with the same by necessary implication.

[16] The learned counsel for the respondents has specifically contended that the appellant had lodged a claim on the basis of the subject lands being harta sepencarian in the Syariah High Court. In the instant appeal the relevant legislation to be considered is the Administration of Islamic Law (Federal Territories) Act 1993 (Act 1993).

[17] Section 46(2) of Act 1993 which stipulates the jurisdiction of the Syariah High Court, including its civil jurisdiction, states *inter alia*;

> (2) A Syariah High Court shall:
>
> (b) in its civil jurisdiction hear and determine all actions and proceedings in which all the parties are Muslim and which relate to:
>
> (i) …
>
> (ii) …
>
> (iii) …
>
> (iv) the division of, or claims to harta sepencarian.

[18] The term "harta sepencarian" is not defined in the Act 1993 but is be found instead in the Islamic Family Law (Federal Territories) Act 1984 (or Act 1984). In this Act s. 2 specifys, *inter alia*, that "harta sepencarian" means property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by Hukum Syariah. It is therefore expressly provided that harta sepencarian is a subject matter within the jurisdiction of the Syariah High Court. Learned counsel for the first respondent in citing the abovementioned provision has also referred to art. 121(1A) FC, in force since 10 June 1988. It is appropriate in dealing with this contention to encapsulate the contention of the learned counsel for the respondent with regard to the consequential lack of jurisdiction of the civil court which are as follows:

(1) by s. 58 of the Act 1984 the Syariah court is empowered to make orders of division of harta sepencarian. The shoulder heading of s. 58 itself provide "Power of Court" to order division of harta sepencarian.

(2) sections 199 and 200 of the Syariah Court Civil Procedure (Federal Territories) Act 1998 [or SCCP (Federal Territories) Act 1998]. Section 199(1) of the SCCP (Federal Territories) Act 1998 provides that the Syariah court may make an order, *inter alia*, for the preservation of property. Section 200 of the same Act provides that the Syariah court may grant an injunction.

(3) The abovementioned jurisdictional powers of the Syariah court have already been invoked by the appellant and that since both the parties in this proceedings are Muslims it followed therefore that art. 121(1A) FC would preclude the determination of the claim of appellant by **any court other than the Syariah court.**

[19] The underlying emphasis is that the determination of the jurisdiction of the Syariah court is undertaken by the "subject matter" approach and not the "remedy approach". Learned counsel for the respondents in support of the submission had cited the Federal Court decisions in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaikh Zolkafly bin Shaik Natar* [2003] 3 CLJ 289 and *Azizah bt Shaikh Ismail & Anor v. Fatimah bt. Shaikh Ismail & Anor* [2003] 4 CLJ 281.

[20] A perusal of the abovementioned decisions reveal that the decisions were indeed premised on the very fact that in both instances while the remedy sought, that is, one for the declaratory relief and the other a notice of motion for a writ of *habeas corpus,* the Syariah court in both instances have, by virtue of specific legislation, been expressly conferred with the subject matter of the claims instituted by the parties.

[21] In the *Majlis Ugama Islam Pulau Pinang dan Seberang Perai case supra,* Haidar Mohd Noor, FCJ (as he then was) in delivering the decision of the Federal Court had also referred to the earlier Supreme Court decision in *Mohamed Habibullah b. Mahmood v. Faridah bt. Dato Talib* [1993] 1 CLJ 264. Certain passages in the *Faridah bt. Dato Talib* case which were referred to are reproduced here for the purpose of eliciting the approach to be taken when the challenge is mounted on the question of an alleged conflict of jurisdiction. Harun Hashim SCJ (as he then was) in *Faridah bt. Dato Talib*'s case expressed, *inter alia* (at p. 271):

> Taking an objective view of the constitution, it is obvious from the very beginning that the masters of the constitution clearly intended that the Muslims of this country shall be governed by Islamic Family Law as evident from the Ninth Schedule to the constitution. Item 1 of the state list provides;
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> > Muslim Law and personel and family law of persons professing the Muslim religion ... the constitution, organization and procedure of Muslim Courts ... the determination of matters of Muslim Law and doctrine and Malay custom.
>
> Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this country in the 15th Century such law have been administered not only by the Syariah courts but also by the civil courts. What art. 121(1A) has done is to grant exclusive jurisdiction to the Syariah courts in the administration of such Islamic Laws. **In other words, art. 121(1A) is a provision to prevent conflicting jurisdictions between the civil courts and the syariah courts.**
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> (Bold for emphasis)

[22] In the case of *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; ([1991] 1 CLJ (Rep) 77) Hashim Yeop A Sani CJ (as he then was) observed *inter alia* at p. 2773 (p. 83):

A … The new Clause 1A of 121 of the constitution effective from 10th June 1988 has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah courts. **But that Clause does not take away the jurisdiction of the civil courts to interpret any written law of the states enacted for the administration of Muslim.**

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(Bold for emphasis)

[23] The abovementioned judicial statements are referred to as both decisions clarify that (i) the purport of art. 121 cl. (1A) is to C prevent conflicting jurisdiction and (ii) civil courts are not precluded from interpreting the written law in question.

[24] In this appeal learned counsel for the respondents has also mounted a challenge to the jurisdiction of the civil court on the issue of abuse of process. It has been contended that since the D appellant has in fact permitted the Syariah High Court to take cognizance of her claim to the subject lands on the basis that it is part of harta sepencarian it is tantamount to an abuse of process for the civil court to also assume jurisdiction. The High Court Judge had in fact determined in this case that the injunction relief E claimed should not be entertained since there was a claim already lodged before the Syariah court.

[25] In *Faridah bt. Dato Talib*'s case, *supra*, the issue of abuse of process was also countenanced in the judgment of Mohamed Azmi F SCJ (as he then was) as follows at p. 274:

… Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police & Ors* at p 536 had this to say:

G My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation H before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that I might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

> Applying the above principle, it is difficult to imagine how the administration of justice can be served if the parties are allowed to abuse the process of the court by hopping from one jurisdiction to another over the same subject matter.

[26] In the light of the abovementioned matters, it is necessary to consider whether the exercise of jurisdiction to entertain the appellant's appeal in the claim for an injunctive relief would lead to an undesirable situation of conflicting jurisdiction and in the course of it cause a duplicity of proceedings which could be an instance of abuse of process.

[27] Before considering the statement of claim of the appellant in pursuance of which a claim is made for the injunctive relief, it is found incumbent once again to revisit the judgment of the Federal Court in *Majlis Ugama Islam Pulau Pinang dan Seberang Perai, supra.* For reasons of clarity and in order to highlight the salient aspect on the question of the jurisdiction of the Syariah court of the judgment it is found necessary to reproduce certain parts of the judgment verbatim as the Federal Court in that case had also dealt with what could be termed as the wider approach to jurisdiction. The relevant part of the judgment is restated thus (per Haidar FCJ):

> Harun Hashim SCJ, in *Mohamed Habibullah* was of the opinion, that when there was a challenge to jurisdiction, the correct approach was to firstly see whether the Syariah court has jurisdiction and not whether the state legislature has power to enact law conferring jurisdiction on the Syariah court.
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> In *Soon Singh*, the Federal Court is of the view that even if there is no express provision in the State Enactment conferring jurisdiction on the Syariah court, the Federal Court took the 'implication approach' in considering the issue of jurisdiction. Mohamed Dzaiddin, FJC (as he then was) stated at p. 22 in *Soon Singh* thus:
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> > It is quite clear to us that the legislative purpose of the State Enactments and the Act is to provide a law concerning the enforcement and administration of Islamic law, the constitution and the organization of the Syariah courts and related matters. Therefore, when jurisdiction is expressly conferred on Syariah courts to adjudicate on matters relating to conversion to Islam, in our opinion, it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the Syariah courts.

A We respectfully agree with this approach. *But what happens in a situation where there is no expression provision at all in the State Enactment giving jurisdiction to the Syariah court on any particular subject matter but the subject matter is within the competence of the state legislature to enact, that is to say, in particular para. 1 of the Second List (State List) in the Ninth Schedule to the Constitution under the caption 'Legislative Lists'*?.

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In *Soon Singh* there is an express provision on the conversion to Islam but not on renunciation of Islam and hence the implication approach. The answer, in our view, is provided by Abdul Kadir Sulaiman, J (as he then was) in *Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419. Though, in *Md. Hakim Lee* the learned Judge took a wider approach in interpreting the issue of jurisdiction, by reference to para. 1 of the Second List called the State List read with Art. 74 of the Constitution when the issue of Art. 121(1A) of the Constitution before his Lordship was in respect of the Administration of Islamic Law (Federal Territories) Act 1993 (a federal legislation), the wider approach taken by His lordship equally applied to the Penang Enactment. In this respect, we quote the relevant passage of the judgment of his Lordship in Md. Hakim Lee (at pp. 425-429):

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> In *Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang & Anor* [1996] 3 CLJ 231, my learned brother held the view to the contrary. He held that the Syariah court is not a creature of syariah law (hukum syarak). It owes its existence to the written laws of Parliament and state legislatures. As such, it is his view that in order to ascertain the question of jurisdiction of the Syariah court, *it is incumbent that reference be made to these laws and see whether jurisdiction over the particular matter is given to the Syariah court or the civil court.* While it is true that the constitution, organization and procedure of the Syariah court is to be so provided by the respective state legislature as so stated in para 1 of the State List read with art. 74 of the Federal Constitution, the issue at hand is not one of the constitution, organization and procedure of the Syariah court. *The issue is a substantive one which a Syariah court, having jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in para 1 of the State List, has the power to adjudicate, and as pointed out earlier, the prayers sought in the application is one touching on the personal law of persons professing the religion of Islam.* Therefore, with respect, it cannot be true to say that in order to ascertain the question of jurisdiction of the Syariah court, reference be made only to the respective laws enacted

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by the state legislature to see whether jurisdiction over the particular matter is given to the Syariah Courts or the Civil Courts provided in art. 121(1) of the Constitution. *To see the jurisdiction of the Syariah court, List II of the Ninth Schedule to the Federal Constitution should not be interpreted so narrowly in the light of the overall jurisdiction given by the Constitution in List II that the Syariah court shall have jurisdiction over persons professing the religion of Islam in respect of matters stated therein.* In *Mohamed Habibullah*'s case, Harun Hashim SCJ at p. 268 said:

> It is obvious that the intention of Parliament by art. 121(1A) is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah court: *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1. I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is to firstly see whether the Syariah court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the Syariah court. The validity of a state law can only be questioned in a separate proceeding under art. 4(3) of the Federal Constitution … And by art. 4(4) read with art. 128, only the Supreme Court may declare any such law invalid in the proceedings referred to in art 4(3). (emphasis added).

The jurisdiction of the Syariah courts given by the Act, in the light of the provisions provided by para 1 of List II mentioned earlier, cannot in any way limit the wider jurisdiction of the courts to deal over persons professing the religion of Islam in respect of any of the matters included in para 1 thereof, as construed narrowly by my learned brother in Lim Chan Seng, by the mere fact that the jurisdiction to decide on the matter of the application of the plaintiff here is not so expressly stated in the Act. If I may call, the wider jurisdiction given by para 1 of List II to the Ninth Schedule to the Constitution is the jurisdiction inherent in the Syariah court, subject of course to the right to exercise that jurisdiction being expressly given by the Act which power is within the competency of the legislature to do under art. 74.

Harun Hashim SCJ in *Mohamed Habibullah*'s case took the objective view of the Constitution thus, at p. 271:

> Taking an objective view of the Constitution, it is obvious from the very beginning that the makers of the Constitution clearly intended that the Muslims of this country shall be governed by Islamic family law as evident from the Ninth

> Schedule to the Constitution ... Indeed, Muslims in this country are governed by Islamic personal and family laws which have been in existence since the coming of Islam to this country in the 15th century. Such laws have been administered not only by the Syariah courts but also by the civil courts. What art. 121(1A) has done is to grant exclusive jurisdiction to the Syariah courts in the administration of such Islamic laws. In other words, art. 121(1A) is a provision to prevent conflicting jurisdictions between the civil courts and the Syariah courts.

Gunn Chit Tuan SCJ in *Mohamed Habibullah*'s case, in response to the submission by learned counsel, said at p. 285:

> With respect to the submission of Mr. Balwant Singh Sidhu regarding whether the plaintiff could be considered an apostate, reference ought to be made to the *dictum* of Mohamed Yusoff SCJ (as he then was) in the recent decision of this court in *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, when it was pointed out that in determining whether a Muslim has renounced Islam, the only forum qualified to answer the question is the Syariah court.

Citing *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, Mohd Azmi SCJ in *Mohamed Habibullah*'s case had this to say at p. 279:

> In *Dalip Kaur v. Pegawai Polis Daerah Bukit Mertajam*, Mohamed Yusoff SCJ, has also expressed the following views:
>
> > It is apparent from the observation made by the learned judicial commissioner that the determination of the question whether a person was a Muslim or had renounced the faith of Islam before death, transgressed into the realm of syariah law which needs serious consideration and proper interpretation of such law. Without proper authority to support his contention, it is not sufficient to say whether there is or there is not a condition precedent for a person to become a Muslim; or that if the deceased were proved to have had said his prayers at a Sikh temple he was definitely an apostate.

> The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned judicial commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.
>
> On this view, it is imperative that the determination of the question in issue requires substantial consideration on the Islamic Law by relevant jurist qualified to do so. The only forum qualified to do so is the Syariah court. (emphasis added).

Therefore, on the principle adumbrated in *Mohamed Habibullah and Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77, I am more convinced of my view expressed earlier that this matter of the plaintiff which involves the determination of his status upon his purported renunciation of the Islamic faith by the deed poll and the statutory declaration is outside the jurisdiction of this court to determine, on account of the ouster of the jurisdiction by art. 121(1A) of the Federal Constitution. By virtue of para 1 in List II of the Ninth Schedule to the Federal Constitution, the jurisdiction lies with the Syariah court on its wider jurisdiction over person professing the religion of Islam even if no express provisions are provided in the Act because under art. 74 of the Constitution, it is within the competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the Syariah court would not make the jurisdiction exercisable by the civil court.

Abdul Kadir Sulaiman, J in our view, rightly took the wider *approach by preferring to follow Wan Adnan, J (as he then was)* in *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1994] 2 CLJ 107 and later affirmed by the Federal Court ([1999] 2 CLJ 5) *and did not follow Lim Chan Seng, in which the learned judge there took a narrow approach.* We would respectfully add that the wider approach is in keeping with the purposive approach which has been given legislative recognition by s. 17A of the Interpretation Act 1984 and 1967 and reads:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

In the circumstances, we would respectfully say that we cannot support the narrow approach taken by Harun Hashim SCJ in *Mohamed Habibullah* at p. 268:

> I am therefore of the opinion that when there is a challenge to jurisdiction, as here, the correct approach is firstly to see whether the Syariah court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the Syariah court. (emphasis added)

The question that may flow from the judgment of Abdul Kadir Sulaiman, J, which we agree, would be what happens when a party may not have his remedy expressly stated in the state law pertaining to Muslim?. The answer, in our view, is not for the courts to legislate and confer jurisdiction to the civil courts but for the state legislature to provide the remedy. *The role of the courts is to interpret the laws and whenever necessary to give effect to the purpose or object of the laws enacted by the legislatures,* (see *United Malacca Bhd. v. Pentadbir Tanah Daerah Alor Gajah and Other Applications* [2002] 4 CLJ 177; *Chor Phaik Har v. Farlim Properties Sdn. Bhd.* [1994] 4 CLJ 285). We need therefore to give effect to the purpose or object of the amendment to art. 121 of the Constitution. As correctly stated by Abdul Kadir Sulaiman, J for which we agree, we requite what his Lordship said at p. 429: *'The fact that the plaintiff may not have his remedy in the Syariah court would not make the jurisdiction exercisable by the civil court.'*

(Italic for emphasis only)

[28] The subject lands have already been included in the claims before the Syariah court and the Syariah action was instituted in accordance with legislation pertaining to the personal law of persons professing the religion of Islam and both parties in the present appeal are persons professing the religion of Islam and hence on the basis of wider judicial approach it would appear that a civil court should be entirely precluded from further taking cognisance of the appellant's claims to prevent duplicity.

[29] The appellant's claim in the civil court is founded on what has been termed as a derivative action with assertions of a beneficial trust. If the wider approach that has been judicially propounded in the line of decisions of the Federal Court as

mentioned above, is also to be applied in this appeal this would entail a perusal of List II (or the State List) of the Ninth Schedule to the Federal Constitution. The subject matters appearing therein are subject matters in respect of which the Federal Legislature is competent to legislate upon in respect of the Federal Territories in matters of the religion of Islam. In effect the wider approach if adopted would mean that if there is a subject matter in the aforementioned State List which the Federal Legislature is competent and capable of legislating upon, by inference a civil court should not therefore assume jurisdiction even if the matter has yet to be legislated upon. If this is indeed the corollary of the wider approach examined above this court should then be incompetent to entertain the injunctive relief sought for.

[30] If Item 1 of the State List of the Ninth Schedule to the Federal Constitution is further perused it also includes, the subject matter "trusts". Furthermore in the item 4(e) of List I (or the Federal List) of the Ninth Schedule to the Federal Constitution paragraph (ii) has excluded the subject matters that are prescribed in paragraph (i) in so far as it may pertain to Islamic personal law relating to marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or succession testate or intestate. It would thus be for example that matters relating to trusts are matters in respect of which there could be legislation according to Syariah precepts and capable of coming within the scope of the jurisdiction of the Syariah court.

[31] Another example, is that if the matter of "negotiable instruments" is being considered in the matter of Islamic personal law relating to marriage, the normal interpretation to be given is that the civil court would have to be circumspect in not assuming jurisdiction should there be disputes involving parties who profess the religion. It is equally to be noted that the subject matters of equity and trust have also been stipulated in para 4(e)(i). The Syariah court is therefore also capable of being vested with jurisdiction in such matters.

[32] On the other hand, List I of the Ninth Schedule or the Federal List to the Federal Constitution includes, *inter alia*, item 8(c) and one of the subject matters specified therein is the subject matter "incorporation". In contrast too it is to be further observed that item 8(c) is not qualified by another paragraph in the manner

that paragraph (ii) qualifies paragraph (i) in item 4(e) in the Federal List. Hence the law relating to companies remains within the *corpus juris* of secular law.

[33] The expression "harta sepencarian" in s. 2 of the Act 1984 refers to property jointly acquired by husband and wife. The subject matters of the appellant's claim in the Syariah court is simply land which are alleged to constitute part of the property jointly acquired. Learned counsel for the appellant has also contended that the Syariah court is capable of conducting an inquiry presumably to consider how the subject land was acquired and other related questions.

[34] The question therefore ensues whether in essence there is here indeed a conflict jurisdiction between the Syariah court and a civil court bearing in mind that *Dalip Kaur*'s case, *supra*, has also observed that cl. 121(1A) does not take away the jurisdiction of the civil courts to interpret any written law of the states enacted for the administration of persons who profess the religion of Islam. There is no suggestion here that there is already in place specific legislation on "equity and trust" in the Islamic personal law although there is no doubt that there are precepts that could be applicable. At this stage it is not known what aspects of Syariah law would be invoked to determine the apportionment of the harta sepencarian.

[35] If cl. 121(1A) FC has been included with the object of overcoming conflict then civil courts should have the role of assisting in avoiding the conflict. With that in mind it is found pertinent to state that the possession of the harta sepencarian is the final outcome whilst the sources of the harta sepencarian may still be attributed to different or varied sources.

[36] Bearing that in mind in this case the appellant is alleging that the original source of acquiring the subject land were transactions conducted by a company, that is, Rasa Rata the outcome of which the subject lands were transferred to the appellant. At this stage this court is to refrain from dwelling in full on the merits but the circumstances surrounding the transfer of the land and the alleged trust establish the fact there are indeed serious issues to be tried at the trial of the appellant's main claim in the High Court.

[37] Consequently even if the subject lands which have since changed form into compensation monies, may have been claimed in the first instance as harta sepencarian, this is not in essence a matter of conflicting jurisdiction but one of a possible overlapping claim for the reasons given hereafter.

[38] The alleged position of the first respondent arose out of the activities of two companies where the first respondent is a common director in both companies. Learned counsel for the appellant has submitted that her action has been based on the following documents:

(i) A Sale and Purchase Agreement dated 10 December 1981 between the first respondent and the second respondent whereby the said lands were sold to the second respondent for RM4.2 million to be satisfied by the issuance and allotment of RM2.9 million shares in the second respondent.

(ii) A Resolution dated 30 November 1981 of the second respondent authorizing the issuance of the 2.9 million shares to the first respondent.

(iii) An express trust deed dated 21 January 1986 under which the first respondent declared, among other things, that he held the said lands in trust for the second respondent as beneficiary. The first respondent had received compensation monies as stated above and utilized it for himself.

[39] The appellant in instituting the derivative action is seeking to enforce a right of the Rasa Rata Company where the company itself has to be made a co-defendant. It has been submitted that the trial judge while admitting that there are triable issues to be tried had summarily dismissed the matter simply on the ground that the Syariah court was already seised of the matter.

[40] The matters mentioned in encl. 4, that is the originating summons in which the application for injunction has been filed are not confined to matters relating to trusts but also the law relating to companies.

[41] The question here is whether this is to be considered as not essentially a matter of conflicting jurisdiction but one which constitutes an overlapping jurisdiction. It is noted that up to this point of time the inception of Syariah precepts into the *corpus juris* of Malaysia is primarily evolutionary in character. There does not

seem here to be an outright conflict of jurisdiction. Courts being vested with the responsibility of interpretation would invariably and in more forthcoming instances be involved with the process of finecombing the issues. In this instance it is also noted that the source of jurisdiction of the civil court to grant injunction is found in sub s. 25(2) of the Courts of Judicature Act 1964 read with para. 6 of the Schedule to the Act. The relevant part states:

> Power to provide for the interim preservation of property the subject-matter of any cause or matter … by injunction …

[42] The jurisdiction of the Syariah court is founded in a legislation which was promulgated later that is after the inception of the Courts of Judicature Act 1964. This would attract the principle of interpretation *lex posterior derogant priori* that is whether the later provisions in the Syariah legislation (which is applicable only to persons whose personal law is Islam) derogates from the prior that is the Courts of Judicature Act 1964. This principle of statutory interpretation has been discussed in the case of *Harshad S. Mehta and Others v. State of Maharashtra* [2001] 8 SCC 257. Although that case pertains to the powers of a special court and whether it has powers to grant pardon by implication whilst those powers are actually found in a general law the discussion relating to the repeal of a legislation by implication found therein is useful. The relevant passages are:

> Mr Jethmalani also sought to invoke the doctrine of implied repeal. Pointing out that the Code is a general law and the Act – a special later enactment, Section 13 whereof shows its predominance and superiority, this Court should not have any reluctance to accept the applicability of doctrine of implied repeal in these matters, was the submission of learned counsel though he, very fairly and rightly, conceded that there is a presumption against a repeal by implication.
>
> The reason for the presumption as aforesaid is that the legislature while enacting a law has a complete knowledge of the existing laws on the subject-matter and, therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation. The burden to show that there has been a repeal by implication lies on the party asserting it. Relying upon *Statutory Interpretation* by Francis Bennion (1984 Edn.), counsel contends that where, as in the present case, the provisions of the later enactment (the Act) are contrary to those of the earlier (the Code), the later by implication repeals the earlier in accordance with the maxim *leges posteriors priores contrarias*

abrogant (later laws abrogate earlier contrary laws). This is, however, subject to the exception embodies in the maxim *generalia specialibus non derogant* (a general provision does not derogate from a special one). A

One of the important tests to determine the issue of implied repeal would be whether the provisions of the Act are irreconcilably inconsistent with those of the Code that the two cannot stand together or the intention of the legislature was only to supplement the provisions of the Code. This intention is to be ascertained from the provisions of the Act. Courts lean against implied repeal. If by any fair interpretation both the statutes can stand together, there will be no implied repeal. If possible, implied repeal shall be avoided. It is, however, correct that the presumption against the intent to repeal by implication is overthrown if the new law is inconsistent with or repugnant to the old law, for the inconsistency or repugnancy reveals an intent to repeal the existing laws. Repugnancy must be such that the two statutes cannot be reconciled on reasonable construction or hypothesis. They ought to be clearly and manifestly irreconcilable. It is possible, as contended by Mr Jethmalani, that the inconsistency may operate on a part of a statute. Learned Counsel submits that in the present case the presumption against implied repeal stands rebutted as the provisions of the Act are so inconsistent with or repugnant to the provisions of the earlier Act that the two cannot stand together. The contention is that the provisions of Section 306 and 307 cannot be complied with by the Special Court and thus the legislature while enacting the Act clearly intended that the said existing provisions of the Code would not apply to the proceedings under the Act. Learned Counsel contends that this Court will not construe the Act in a manner which will make Section 306 and 307 or at least part of the said sections otiose and thereby defeat the legislative intendment whatever be the consequences of such an interpretation. B C D E F G

The contention further is that the deficiency in the Act, if any, cannot be provided by the court particularly when the language is plain and simple and the assumed gaps cannot be filled by the court and that the willful omission made by the legislature has to be respected by the court. On the legislature willfully omitting to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the court is not competent to supply the omission under the guise of interpretation by analogy or implication, something what it thinks to be a general principle of justice and equity, reliance has been placed upon *CST v. Parson Tools and Plants, Lord Howard De Walden v. IRC, Johnson* H I

v. Moreton and *Harcharan Singh v. Shivrani.* The contention is that any interpretation by this Court other than the one propounded would be entrenching upon the power of the legislature. On the principles of interpretation, on detailed consideration of various decisions of this Court and courts of other countries, in *S.P. Gupta v. Union of India a Bench* of seven Judges said:

> 199. But there is one principle on which there is complete unanimity of all the courts in the world and this is that where the words pr the language used in a statute are clear and cloudless, plain, simple and explicit, unclouded and unobscured, intelligible and pointed so as to admit of no ambiguity, vagueness, uncertainty or equivocation, there is absolutely no room for deriving support from external aids. In such cases, the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words therefrom.

[43] In addition the abovementioned decision also made a ruling which has been referred to in *N.S Bindra's 'Interpretation of Statutes'* 9th edn at p. 356 as follows:

> The rule of harmonious construction is applicable not only to the conflicting provisions of the same statute but also in cases where the provisions of different statutes are in conflict.

[44] At p. 288 the court had ruled as follows:

> The provisions of the Act and the Code can stand together. There is no inconsistency. The two statutory provinces can harmoniously operate without causing any confusion or resulting in absurd consequences.

[45] It is found that in this appeal the court here is not concerned with conflicting provisions in the same legislation but a question of interpretation on the question of jurisdiction. It is thought also apt here to harmonise the interpretation to be given to the jurisdiction of the Syariah and civil courts. The ascertainment of the precise status of the subject lands before they changed form into a monetary compensation is the issue before the civil court. The determination of the question relating to the transactions alleged to be undertaken by two companies namely Sri Alam and Rasa Rata is capable of assisting rather than negating the jurisdiction of the Syariah court for purposes of apportioning the harta sepencarian. It is not seen here how the efficacy of the jurisdiction of the Syariah court would be impaired or prejudiced by a civil court determining whether there were

indeed transactions undertaken by a company in respect of which both the appellants and respondents are directors. In any event this is not strictly a matter concerning the practise of faith in Islam but one of matters relating to the activities of companies where the persons involved are professing the religion of Islam. The core of the appellant's claim remains within the sphere of secular law. The first two objections to jurisdiction are therefore not upheld. It is found that this court is able to exercise its jurisdiction without violating the object of art. 121(1A) FC.

[46] Having dealt with the two objections as stated above the third objection raised by learned counsel of the respondent in opposition of the application for an injunction dwells on the issue of an alleged misleading conduct. It is averred that the appellant had failed to disclose to the High Court that an action had been commenced by her in the Syariah court for a half share of the subject lands as harta sepencarian. This, it was averred, was in contradiction of her averment in the application for injunction that the subject lands belong instead to the second defendant (now second respondent). In the Syariah action the appellant had given sworn evidence that the subject lands are registered in the name of the first respondent and hence the averments made by her in her affidavit are alleged to be misleading.

[47] This contention has been met by the response that in one of the affidavits in support of the application for injunction the appellant had affirmed that it was only in recent times that the appellant had discovered a trust deed indicating for the first time that the purchase price for the subject lands had in fact been paid by the second defendant/ respondent and hence it was beneficially entitled to the said subject lands.

[48] In addition the appellant contended that the trust deed which was averred to be executed on 21 January 1986 by the first respondent declared, *inter alia*, that he held the said lands in trust for the second defendant as beneficiary. What is alleged here by the appellant is that there is also the willful suppression of the existence of the trust deed by the first respondent. The explanation provided by the appellant is found to be plausible in considering whether her actions are indeed intended to be deliberately misleading or otherwise. Having dealt with this point it is still necessary in line with the decision in *American Cyanamid Company v. Ethicon Limited* [1975] AC 396 to consider (i) whether damages should be the more adequate remedy and (ii) whether the

balance of convenience lies in favour of granting the injunction. May LJ explained in *Cayne v. Global Natural Resources plc* [1984] 1 All ER 225 at 237 H:

> That (the balance of convenience) is the phrase which, of course is always used in this type of application. It is, if I may say so a useful shorthand but in truth … the balance that one is seeking to make is more fundamental, more weighty than mere 'convenience'. I think that it is quite clear … that although, the phrase may well be substantially less elegant, the balance of the risk of doing injustice better describes the process involved.

[49] In the present appeal the appellant is seeking to maintain a *status quo,* that is the compensation monies standing in the account of the first respondent hazards a risk of being used up, transferred or even dissipated. It is also contended that this not strictly a question of seeking damages but a restitution of the assets that are alleged to be rightly standing to the credit of the second respondent instead. On this ground it was contended that the question whether damages would be a more adequate remedy was irrelevant. This point has not been seriously contested.

[50] The risk of doing the injustice in the circumstances of the case would operate against the appellant as the compensation from the acquisition of the subject lands have already been transferred to the first respondent and it is further contended that more compensation would be expected.

[51] However the court has also to consider whether the injunction if granted should be so granted in terms which are as wide as prayed for. It is to be recalled that while both the appellant and first respondent are directors of Rasa Rata, the appellant is the minority shareholder of the second respondent company in which she is the registered and beneficial owner of 512,000 ordinary shares of RM1 per share equivalent to 7.97% in the capital of the second respondent company.

[52] Hence if the first respondent is to be ordered to be injuncted from utilizing or transferring or withdrawing the sums received by him which amounts are totalling RM119,536,026 as compensation for the acquisition of the subject land, and the concern here is that it would be too wide in its terms as the first respondent as a director and majority shareholder of the second respondent company and being the registered and beneficial owner

of 5,909,039 ordinary shares of RM1 per share it is equivalent to 92.03% in the capital of the second respondent.

[53] In the final analysis this court is minded to allow the appeal by setting aside the order of the Learned High Court Judge in refusing the application for injunction.

[54] In consequence an order for an injunction is also granted in that the first respondent is to be restrained from utilizing or withdrawing the sums received by the 1st respondent up to an amount equivalent to 7.97% of the total of RM119,536,026 which is being kept with AM Finance Bhd. at its headquarters in Kuala Lumpur or any other financial institution inclusive of accrued interest thereon and to be further restrained from using any payments of compensation from the relevant authorities in respect of the aforesaid lands for any other purposes than for the benefit of the second respondent. Order in terms is also granted in respect of paras 2 and 3 of encl. 4. Costs is to follow the event. The deposit is to be refunded to the appellant.

[55] My learned brothers Justice Zulkefli Ahmad Makinudin and Justice Raus Sharif have read the draft copy of this judgment and agreed with it.